Commission fully and completely of the nature of any defense, and shall respond specifically to all material allegations of the complaint."[110] Additionally, we decline to adopt SBC's suggestion that complainants be required, before filing their complaints, to send a certified letter to the defendant outlining their claims.[111] We believe that this information will be adequately conveyed during the parties' pre-filing discussions.

43. Notwithstanding the criticisms that several commenters level at the short answer period proposed in the *Public Notice*, we strongly believe that the ten-day period we have adopted is appropriate. First, we note that the Act expressly grants the Commission broad discretion to conduct its "proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."[112] Courts applying this language in reviewing the Commission's procedural rules regularly have recognized the Commission's wide authority in questions of its own procedures. Thus, in *FCC v. Schreiber*, the Court noted that the Commission "should be free to fashion [its] own rules of procedure and to pursue methods of inquiry capable of permitting [it] to discharge [its] multitudinous duties."[113] In *Florida Cellular Mobile Communications Corp. v. FCC*, the court stated, in the context of a licensing dispute, that there "can be no doubt of the FCC's authority to impose strict procedural rules."[114]

44. Apart from complying with the relevant statute, the primary limitation on agency procedures is that they must comply with the requirements of due process.[115] As we

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110 *See First Report & Order*, 12 FCC Rcd at 22534, ¶ 81.

111 *See* SBC Comments at 15.

112 47 U.S.C. § 154(j).

113 381 U.S. 279, 290 (1965) (quoting *FCC v. Potsville Broadcasting Co.*, 309 U.S. 134, 143 (1940)).

114 28 F.3d 191, 198 (D.C. Cir. 1994) (quoting *Glaser v. FCC*, 20 F.3d 1184, 1186 (D.C. Cir. 1994)). *See also, e.g., Massachusetts v. U.S. Nuclear Regulatory Comm'n*, 924 F.2d 311, 333 (D.C. Cir. 1990) (NRC has "wide discretion to structure its licensing hearings in the interests of speed and efficiency"); *Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n*, 920 F.2d 50, 53 (D.C. Cir. 1990) ("absent constitutional constraints or extremely compelling circumstances courts are never free to impose on [administrative agencies] a procedural requirement not provided for by Congress") (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978); internal quotation omitted).

115 *See, e.g., Withrow v. Larkin*, 421 U.S. 35, 46 (1975); *McClelland v. Andrus*, 606 F.2d 1278, 1285-86 (D.C. Cir. 1979).

discuss above, through the supervised pre-filing settlement discussions, potential defendants will have full notice of the likely claims against them substantially in advance of the filing of a complaint. We believe that, when combined with this pre-filing period, the ten-day answer period comports with the requirements of due process. By diligently reviewing their records and conducting the appropriate interviews both before and after the complaint is filed, defendants should have ample opportunity to gather the information necessary both to file their answer and to produce the documents that, as we discuss below,[116] must be served with it. We recognize that an answer period of this short duration will put defendants and their counsel to a greater burden than may exist under the 20-day answer period in the more generally applicable rules. However, as discussed above, defendants in Accelerated Docket proceedings will be required to assemble substantially less information before filing their answer than is required under the rules set out in the *First Report & Order*. Thus, Accelerated Docket defendants will not be required to prepare proposed findings of fact and conclusions of law or affidavits regarding the facts pleaded in their answers.[117] Nor will they be required to create the index of relevant documents required under the *First Report & Order*.[118] Moreover, defendants are not the only ones who will be required to litigate their cases more quickly than in the past. In order to achieve the faster disposition of complaint proceedings, the Accelerated Docket will require greater diligence and timeliness of both parties.

45. Due process analysis does not turn solely on whether parties face a greater burden than they had before. Rather, the appropriate inquiry is whether a procedural limitation is so severe that a party is prevented from preparing an effective defense. We are aware of no authority, and the commenters cite none, holding that an expedited procedure of the type that we implement today amounts to a denial of due process. Commenters merely raise general assertions about the inadequacy of the shortened answer period.[119] Only SBC attempts to cite specific legal authority to support its due process argument, and it relies principally on a decision from 1900 that is plainly inapposite.[120] In *Roller v. Holly*[121] the

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116 *See infra* ¶¶ 48 - 58.

117 *See supra* ¶ 40; Appendix, Rules 1.724(k)(2) & (3).

118 *See supra* ¶ 41; Appendix, Rule 1.724(k)(5).

119 *See, e.g.*, Bell Atlantic Comments at 7; Cincinnati Bell Comments at 7; GTE Comments at 8.

120 In support of its due process argument, Ameritech cites a number of cases. *See* Ameritech Comments at 8 n.9. However, none of them addresses the specific question of whether an

(continued...)

Court found a denial of due process when a summons directed the recipient in Virginia to appear in a Texas court five days later to defend himself. The Court did not hold that, as an absolute matter, five days was too little time to respond effectively to process of the type involved in that case. Rather, the Court relied on the fact that the trip from Virginia to Texas would require four of the five available days and the respondent would have had only one day in which to prepare his case. The Court emphasized that the adequacy of a response period turned on whether it permitted a defendant sufficient time "to prepare his defense and for his journey."[122]

46. We find the *Roller* decision, written in the era before commercial automobiles, airplanes, facsimile machines and e-mail, to be of no probity in evaluating the propriety of a 10-day answer period nearly 100 years later. Defendants on the Accelerated Docket will have the full ten-day answer period, as well as the pre-filing period, to conduct their investigation and prepare their answer. Accordingly, we believe that the answer period we adopt for the Accelerated Docket is adequate.[123]

IV. Discovery

47. The *Public Notice* sought comment on a variety of issues surrounding the conduct of discovery in an expedited process like that proposed for the Accelerated Docket.[124]

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120 (...continued)
adjudicatory process that operates on a shortened timeframe, like that created here, *per se* violates due process.

121 176 U.S. 398 (1900).

122 *Id.* at 409.

123 We have not conducted an extensive survey of the procedural rules of the various state commissions; however, we note that Illinois has adopted a time cycle for complaints before its state commission that is at least as expedited as that which we announce today. Illinois law governing carrier-related complaints provides for an answer period of only seven days and affords defendants pre-filing notice of only 48 hours. *See* Ill. Legis. Serv. P.A. 90-574 (H.B. 263) (amending 220 Ill. Comp. Stat. 5/13-515(c), (d)(4)). It permits discovery requests to be served with the complaint and requires responses to such requests within fourteen days. *Id.* (amending 220 Ill. Comp. Stat. 5/13-515(d)(3)). Moreover, the Illinois legislation requires the hearing itself to begin 30 days after the complaint has been served. *Id.* (amending 220 Ill. Comp. Stat. 5/13-515(d)(7)). The very short deadlines in the Illinois statute lend additional support to our conclusion that the answer period and, more generally, the time table that we adopt for Accelerated Docket proceedings are reasonable.

124 *Public Notice* at 4, ¶ 3.

The *Public Notice* stated that discovery on the Accelerated Docket generally would be governed by the rules promulgated with the *First Report & Order*. It inquired, however, whether parties to Accelerated Docket proceedings should be required automatically to produce documents that bear the appropriate relevance relationship to the issues in the complaint proceeding, and it asked when such production should take place. Furthermore the *Public Notice* sought comment on whether the parties should be required to submit all discovery requests and disputes to the responsible staff in advance of the initial status conference, discussed below, so that the staff could issue its decision on these matters at the status conference, after consultation with the parties. The *Public Notice* also asked what measures would be appropriate sanctions for parties that failed to provide discovery as ordered.

A. Timing of Automatic Document Production

48. Commenters display a wide range of reactions to the proposal regarding timing of automatic document production.[125] Several comments support requiring that parties on the Accelerated Docket produce to their opponents some universe of discoverable documents at the time that they file their initial pleadings.[126] These commenters note that the pre-filing settlement discussions will afford both sides advance notice of the issues likely to arise in an action even before the complaint is filed. Accordingly, commenters assert that both parties will have an adequate opportunity to gather and produce the appropriate documents with their initial pleadings.

49. On the other hand, several commenters vigorously assert that it will be impossible for defendants in complaint actions to comply with a rule requiring the automatic production of documents with an answer that is due less than 20 days after the filing of a complaint.[127] Indeed, some of these commenters assert that the 20-day answer period established in the *First Report & Order* is workable only because defendants may produce an

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[125] *Compare* SBC Comments at 9 (proposed schedule offers "no reasonable opportunity for any type of discovery process"), Ameritech Comments at 18 (only limited interrogatories possible in a sixty-day complaint process), *and* Cincinnati Bell Comments at 4 (extremely difficult to conduct meaningful discovery within proposed timeframe); *with* ICG Comments at 5 (supporting requirement that all relevant documents be produced when complaint and answer are filed), *and* RCN Comments at 4 (same).

[126] *See, e.g.*, ICG Comments at 5; RCN Comments at 4.

[127] *See, e.g.*, SBC Comments at 9; Ameritech Comments at 18; Cincinnati Bell Comments at 4.

inventory of documents with their answer, rather than producing the documents themselves.[128] Additionally, one commenter opposing production of documents with initial pleadings asserts that such a rule would unfairly burden defendants because complainants would be able take their time assembling their documents before they initiate a complaint proceeding, while defendants would be required to perform the same task during the abbreviated period of time before their answer is due.[129] As an extension of this argument, SBC points out that, during the time that defendants would be required to assemble documents for production, they would also have to be conducting several other tasks relating to the preparation of their answers.[130]

50. After review of the comments relating to the timing of document discovery on the Accelerated Docket, we conclude that a rule requiring the production of the most central, but not all relevant, documents with the complaint and answer is most likely to lead to the realization of our goal of creating a docket that is both effective and faster than the current system for adjudicating complaints. As several commenters note, during the supervised pre-filing discussions, parties to a complaint proceeding will gain detailed notice of the facts and legal issues involved in a case.[131] Thus, defendants will have more opportunity to assemble the appropriate documents than would be afforded by the answer period alone.

51. Furthermore, we believe that the production of documents we require by today's rules actually may make the document portion of the discovery process demand less of the parties' time and move more quickly than the process in the *First Report & Order*, which requires that parties provide their opponents with an index giving substantial information about each discoverable document.[132] First, the rule of automatic production which we adopt today for the Accelerated Docket will obviate the need for a party seeking a particular document to go through the process of requesting it after reviewing the document index that forms a part of the information designation under the *First Report & Order*. Second, descriptions of documents, even when prepared in the best of faith, will inevitably inject a subjective component into the discovery process which, in turn, may lead to time-consuming disputes about the discoverability or importance of certain items. By contrast, we believe that requiring production of the actual documents should reduce the uncertainty and disputes that may arise from the creation of a description of each document. Third, contrary

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128 *See, e.g.*, Ameritech Comments at 22.

129 *See, e.g.*, BellSouth Comments at 9.

130 *See* SBC Comments at 4, 10.

131 *See, e.g.*, MCI Comments at 9.

132 *See* 47 C.F.R. §§ 1.721(a)(10)(ii), 1.724(f)(2).

to the assertion of certain commenters, we believe that parties will expend markedly fewer resources in assembling and producing the appropriate documents than they would in assembling the documents and then preparing the detailed index required under the *First Report & Order*. Thus, our rule for the Accelerated Docket requiring automatic production of documents meeting the appropriate standard will likely increase the speed and effectiveness of the discovery that each party obtains.

B. Content of Automatic Document Production

52. The *Public Notice* also sought comment on what standard should be adopted to guide the automatic production of documents on the Accelerated Docket.[133] It asked whether parties should produce all documents relevant to the issues raised in the complaint, or whether we should adopt a standard requiring some closer relationship to the issues in the action. In particular, the *Public Notice* suggested the possibility of using the standard in the local rule governing automatic disclosure in the U.S. District Court for the Eastern District of Texas. This standard requires the automatic production, early in the discovery phase, of "all documents, data compilations, and tangible things in the possession, custody, or control of the party that are *likely to bear significantly* on any claim or defense."[134] The court defines this standard as requiring, *inter alia*, production of information that "would not support the disclosing parties' contentions," that is "likely to have an influence on or affect the outcome of a claim or defense," or that "competent counsel would consider reasonably necessary to prepare, evaluate or try a claim or defense."[135]

53. A substantial majority of commenters assert that the parties' automatic production with their initial pleadings should include all documents relevant to the issues in the complaint proceeding. These commenters express a variety of concerns about the "likely to bear" standard. They assert that it is too vague effectively to guide the parties' production efforts and therefore would be open to strategic application by counsel seeking to avoid the production of damaging documents.[136] In light of the asserted vagueness, commenters also argue that the standard would be difficult for the Commission to enforce effectively.[137] Ameritech argues that, by requiring parties to determine what documents might be damaging

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133 *See Public Notice* at 4, ¶ 3.

134 E.D. Tex. R. 26(c)(1)(B) (emphasis added).

135 *Id.* R. 26(c)(3).

136 *See, e.g.*, Ameritech Comments at 23; RCN Comments at 4.

137 *See, e.g.*, Ameritech Comments at 23.

to their cases, the "likely to bear" standard improperly would impinge on the protections of the attorney-client privilege and the work-product doctrine.[138] By contrast, Teligent asserts that routinely requiring production of the broader category of relevant documents will permit parties to dump on their opponents quantities of documents that are too great to be reviewed within the time constraints of the Accelerated Docket.[139] Because of this difficulty, Teligent argues that document production should be available upon request, but not automatically.[140]

54. After review and consideration of the various comments regarding the appropriate standard, we have determined that, on the Accelerated Docket, the parties' automatic document production will be governed by the "likely to bear" standard proposed in the *Public Notice*. Thus, at the time the parties file their initial pleadings in an Accelerated Docket proceeding, they will be required to produce to each other all documents, data compilations, and tangible things "in the possession, custody, or control of the party that are *likely to bear significantly* on any claim or defense."[141] This standard will include materials: (1) that would not support the disclosing party's contentions; (2) that are likely to have an influence on or affect the outcome of a claim or defense; (3) that reflect the relevant knowledge of persons who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the parties; or (4) that competent counsel would consider reasonably necessary to prepare, evaluate or try a claim or defense.[142] Fundamentally, if a party would expect to proffer a document at the minitrial as an exhibit in support of its case, the party should produce the document. Similarly, if the party would expect its opponent, if it had the document, to proffer it as an exhibit against the party, the document also should be produced.

55. Despite most commenters' lack of enthusiasm for this standard, we adopt it because we believe that it will lead to the most manageable system for the initial, automatic document productions on the Accelerated Docket. We are not persuaded by the comments asserting that the standard is so vague that it will lend itself to abuse by counsel or that it will be difficult to enforce. As with any standard for document production, including relevance, the "likely to bear" standard requires counsel to apply a set of general rules to decide whether particular documents are subject to production in a certain dispute. We have no reason to

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138 *See* Ameritech Comments at 23.

139 *See* Teligent Comments at 5.

140 *See id.*

141 *See* Appendix, Rule 1.729(i)(1).

142 *See* Appendix, Rule 1.729(i)(1). *Cf.* E.D. Tex. R. 26(c)(3).

suspect, nor have the commenters given us any reason to believe, however, that the "likely to bear standard" is any more susceptible to manipulation by counsel than is the relevance standard. Nor does the standard appear to be inherently more difficult for an adjudicator to apply in deciding discovery disputes or imposing sanctions. On the contrary, the "likely to bear" standard, as explicated by the four criteria in our rule, will provide sufficient guidance to both counsel and the members of the Commission staff charged with applying it. For instance, if a document undermines a party's contention in a complaint proceeding, it is subject to production under this standard. By the same token, if it appears to counsel that competent counsel representing her opponent would consider a document of substantial importance in evaluating, preparing or trying some aspect of the opponent's case, the document is similarly subject to production.

56. What we envision this standard as likely to avoid is the production of every single document that is relevant, even if only tenuously so, to the issues in a complaint proceeding. We believe that the parties' needs for discovery would be poorly served by a rule requiring such broad production in a process that runs as quickly as the new docket will. This is especially true when, as with the Accelerated Docket, an overly voluminous document production might allow the producing party effectively to hide damaging documents in a welter of marginally relevant material. We are hopeful that the "likely to bear" standard will focus both parties' production efforts on the documents of core relevance to a particular proceeding. Thus, it should reduce the volume of documents produced by each side and ensure that the party receiving a production will be able fully to review the material in the time available in Accelerated Docket proceedings. Additionally, if a party learns of documents that appear to be significant but were not in the automatic production it received, the party may request, at the initial status conference, the production of additional documents.[143]

57. We are not persuaded that the standard that we adopt for automatic document production on the Accelerated Docket will improperly impinge on either the parties' attorney-client privilege or on the protection accorded to attorney work product.[144] This standard will require those assembling material for production honestly to evaluate each document's relationship to the issues in the proceeding. It will require counsel to bear in mind the claims and defenses raised in the action and to determine each document's logical relationship to those issues. It will not, however, require a description by counsel or the producing party of why it views a document as being subject to production. Thus it will neither cause the disclosure of attorney-client confidences, nor will it reveal attorney work product. Our conviction in this regard is heightened by the fact that, as noted in the *Public Notice*, the U.S.

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143 *See infra*, ¶ 75; Appendix, Rule 1.733(i)(4).

144 *Cf.* Ameritech Comments at 23.

District Court for the Eastern District of Texas has imposed the "likely to bear" standard in connection with the automatic, initial disclosure requirements under the Federal Rules of Civil Procedure. Indeed, that court initially implemented the standard as part of a pilot program of procedural reforms, but has since adopted it as part of the permanent local rules.[145] Nevertheless, in light of the substantial opposition to the "likely to bear" standard, the staff administering the docket will monitor closely the proceedings in which it is applied to ensure against its abuse. If necessary, at a later date, we may refine or modify the standard to ensure fair and expeditious completion of the initial document production on the Accelerated Docket.

58. We note that, both with their initial document productions and subsequent productions that may be ordered, parties may have occasion to produce documents for which they wish to request confidential treatment. Production of such documents shall be made in accordance with Rule 1.731.[146] In the rare case in which a producing party believes that Rule 1.731 will not provide adequate protection for its assertedly confidential material, it may request either that the opposing party consent to greater protection, or that the staff supervising the proceeding order greater protection.

C. Depositions and Other Discovery

59. As indicated in the *Public Notice*,[147] we also contemplate that, in many instances, parties to Accelerated Docket proceedings will have the opportunity to depose certain key witnesses who have personal knowledge of the relevant issues in dispute. We believe that a limited number of depositions in proceedings on this docket will serve our goal of ensuring that the parties fully may develop their cases so that staff decisions in the proceedings will be both fully informed and rendered with the speed that a complete record allows. In order to facilitate the scheduling of such depositions within the time constraints of the Accelerated Docket, we believe that, as suggested by MCI, parties should be required to exchange information about individuals with knowledge relevant to the issues of a proceeding.[148] It appears that this exchange of witness information will be accomplished most effectively through the use of the information designation set out in the rules accompanying

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145 *Compare* E.D. Tex. Civ. Justice Expense & Delay Reduction Plan, art. II § 1(a)(ii) *with* E.D. Tex. R. 26(c)(1)(B), 26(c)(3).

146 47 C.F.R. 1.731.

147 *Public Notice* at 4, ¶ 3.

148 *See* MCI Comments at 10.

the *First Report & Order*.[149] Thus, while the automatic document production discussed above will take the place of that portion of the information designation that calls for a description of relevant documents, we require that parties on the Accelerated Docket provide, with their initial pleadings, a designation containing the name, address, and position of each individual believed to have firsthand knowledge of the facts alleged with particularity in its pleading, along with a general description of the relevant facts within any such individual's knowledge.[150] Alternatively, this designation may refer to the paragraph numbers of the appropriate pleading as a means of describing the scope of an individual's knowledge. As discussed below, in its filings before the initial status conference, a party may request approval to conduct the depositions of individuals with knowledge relevant to a complaint proceeding, including those individuals listed in an opponent's information designation;[151] in their pre-status-conference filings, parties also may request additional document production or, where appropriate, interrogatories.[152] We expect that, where the requested discovery is reasonable and consistent with the applicable time constraints, staff will be inclined to grant it. In order to ensure diligence and completeness in each party's designation of individuals with relevant knowledge, no party, absent a showing of good cause, will be permitted to call as a witness at a minitrial, or otherwise offer evidence from, any individual in that party's employ who does not appear on the party's information designation with a general description of the issues on which the individual will offer evidence.[153]

60. Additionally, we note that parties may wish, in some instances, to rely on expert testimony in Accelerated Docket proceedings. As with fact witnesses, it is important that parties have an opportunity to explore the substance of, and the basis for, expert testimony offered by an opponent. Given the rapid pace of Accelerated Docket proceedings, however, it will be necessary for such witnesses to be identified, and for the substance of their testimony to be disclosed, as quickly as possible. A complainant who plans to introduce expert evidence for a purpose other than to rebut the defendant's expert evidence will be required to identify the witness or witnesses in the information designation accompanying its

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149 *See* 47 C.F.R. §§ 1.721(a)(10), 1.724(f).

150 *See* 47 C.F.R. §§ 1.721(a)(10)(i), 1.724(f)(1).

151 *See infra* ¶ 75; Appendix, Rule 1.733(i)(4).

152 *See infra* ¶ 62.

153 *See* Appendix, Rule 1.730(g)(4).

complaint.[154] In addition to identifying its expert witness, complainants also will be required to provide, at the time they file their complaint, a brief statement of the opinions to be expressed by the expert, the basis and reasons therefor and any data or other information that the witness considered in forming her opinions, as is required in Federal Rule of Civil Procedure 26(a)(2)(B).[155]

61. We require that defendants who intend to rely on expert testimony identify their experts at the time that they file their answer.[156] Defendants shall also disclose the other material relating to their expert witnesses that is required of complainants; however this disclosure may be made in the defendant's filing that is due two days before the initial status conference.[157] If a complainant chooses to rely on previously unidentified experts to rebut any portion of the defendant's case, the complainant shall identify such experts and make the other required disclosures about their testimony at the initial status conference.[158] By the end of the initial status conference, the parties will have provided full disclosure of any expert testimony on which they intend to rely, and they will be in a position to seek staff approval to depose expert witnesses from whom they may want additional discovery.

62. In light of the numerous tasks that the parties will be required to complete at the beginning of Accelerated Docket proceedings, we see no purpose to routinely allowing the service of interrogatories before the initial status conference. Responding to interrogatories at the initial phase of an Accelerated Docket proceeding might well be difficult for parties that already will have other discovery and pleading requirements that they must meet. Moreover, we believe that interrogatories would be of limited utility in a process that will offer parties substantially more detailed discovery through document production and depositions. Accordingly, the rules that we adopt today provide that parties to Accelerated Docket proceedings may propound interrogatories only after the initial status conference and with the

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154 *See* Appendix, Rule 1.729(i)(4)(i). We believe that disclosure, during the pre-filing phase, of a party's intent to rely on expert testimony and the substance of that testimony may well increase the chances of reaching a negotiated resolution to a dispute. However, we have chosen not to mandate such disclosure because of our concern that pre-filing discussions proceed quickly and on a relatively informal basis.

155 *See* Appendix, Rule 1.729(i)(4)(i).

156 *See* Appendix, Rule 1.729(i)(4)(ii).

157 *See id. See also id*, Rule 1.733(i)(4) (governing pre-status-conference filing).

158 *See* Appendix, Rule 1.729(i)(4)(iii).

permission of the staff supervising the proceeding.[159] At the initial status conference, when the parties request leave to take depositions or request additional document production, they may also seek staff approval to serve a limited number of interrogatories on their opponent. The decision of whether to permit such interrogatories shall be within the discretion of the staff administering the proceeding; however, where the request is reasonable, we expect that staff will be inclined to grant it.

D. Sanctions

63. The *Public Notice* also sought comment on what types of sanctions would be appropriate for parties who had failed to comply with their discovery obligations in Accelerated Docket proceedings.[160] In a process that will move at the pace of the Accelerated Docket, it will be crucial that staff be able effectively to compel prompt action and adherence to its discovery orders. Without such sanction authority, a recalcitrant party likely would be able to delay a proceeding enough that many of the docket's projected benefits would vanish.

64. Many commenters recognize the importance, and support the availability, of sanctions to enforce discovery obligations on the Accelerated Docket.[161] Commenters offered diverse suggestions for appropriate sanctions. Some suggest that discovery violations be met with findings against the recalcitrant party on factual issues relating to the information that was improperly withheld or delayed.[162] Sprint suggests the more severe sanction of dismissal of a complaint or default judgment against the party who has failed to fulfill its discovery obligations.[163] One commenter even supports the announcement and imposition of monetary penalties for discovery violations.[164] Finally, RCN advocates a presumption in favor of sanctions so that a violating party would be required to show cause why it should not be sanctioned for a particular violation.[165]

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159 *See* Appendix, Rule 1.729(i)(3).

160 *Public Notice* at 4, ¶ 3.

161 *See, e.g.*, Cincinnati Bell Comments at 6; ICG Comments at 5; RCN Comments at 5-6; Sprint Comments at 4-5; WorldCom Comments at 7.

162 *See, e.g.*, Cincinnati Bell Comments at 6.

163 *See* Sprint Comments at 5.

164 *See* WorldCom Comments at 7.

165 *See* RCN Comments at 5-6.

65. We strongly believe that swift and effective sanctions will be necessary to ensure against attempts to prolong Accelerated Docket proceedings through discovery delay or abuse. Appropriate sanctions should also deter attempts to affect the substance of proceedings by improperly withholding information. Parenthetically, we note that attempts to hide damaging information in an unnecessarily voluminous production also amount to discovery abuse and may draw sanction. The appropriate sanction for a discovery violation necessarily depends heavily on the facts of the particular situation in which it occurs. It therefore is difficult to establish prospectively the precise facts under which a certain sanction may be available. Rather, we believe it will encourage the parties' strict compliance with discovery obligations for us to grant the staff administering the Accelerated Docket broad discretion to respond to discovery violations with the sanction that it deems to be appropriate. Thus, the staff may choose to deny or limit the discovery requests of a party that has failed to make discovery in compliance with the applicable rules and orders. Or it may choose to exclude from presentation at the minitrial some portion of the evidence to be offered by a recalcitrant party.[166] For example, as noted above, absent a showing of good cause, the staff will not permit a party to present evidence from a witness in the party's employ if the witness has not been appropriately designated as an individual with relevant knowledge at the time of the party's initial pleading.[167] Similarly, the Commission staff would be within its discretion to exclude evidence on a certain issue as a sanction for a discovery violation. In other cases staff might choose to grant either dismissal or default judgment as a sanction for a violation. It could grant such summary disposition on either a single claim or a group of claims. Indeed, disposition of an entire proceeding may even be appropriate for especially serious abuses.[168] Finally, we note that, under section 503(b),[169] the Commission retains the authority to impose forfeitures as a means of enforcing its rules and orders.

66. We believe that there may be circumstances in which a party's failure to comply with discovery orders may be due to circumstances beyond its control. We therefore

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[166] *See Paradigm Sales, Inc v. Weber Marking Systems*, 880 F.Supp. 1247 (N.D. Ind. 1995) (prohibiting presentation of witness or use of documents at trial if they were not disclosed under automatic disclosure provision).

[167] *See* Appendix, Rule 1.730(g)(4).

[168] *See BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045 (11th Cir. 1994); *Woodstock Ventures v. Perry*, 164 F.R.D. 321, 322-23 (N.D.N.Y. 1996); *Davies v. Fendler*, 650 F.2d 1154, 1161 (10th Cir. 1981) (default as sanction for failure to respond to interrogatories was appropriate); *Payne v. Exxon Corp.*, 121 F.3d 503 (9th Cir. 1997) (upholding district court order dismissing plaintiff's claims for failure to comply with discover orders).

[169] *See* 47 U.S.C. § 503(b)(1).

decline to create the presumption, suggested by RCN, that all discovery violations will be subject to sanction.[170] Nevertheless, we expect parties on the Accelerated Docket to be diligent in complying with their discovery obligations. Contrary to Ameritech's assertion,[171] we do not believe that inadvertent discovery violations will be commonplace on the Accelerated Docket. Throughout the initial phases of proceedings on the new docket, the responsible staff will be available to respond to discovery questions that the parties may have. Moreover, the discovery rules we adopt today are neither difficult to understand nor markedly different from the rules governing such matters in other forums. We therefore expect that truly inadvertent violations will be exceedingly rare. The majority of violations therefore likely will open the recalcitrant party to some combination of the above sanctions.

V. Status Conferences

67. The *Public Notice* sought comment on the timing and content requirements for the initial status conference in the Accelerated Docket proceedings.[172] It proposed that, to accommodate the time constraints of the Accelerated Docket, the initial conference take place 15 calendar days after the filing of the complaint and that the parties be required to meet before the conference to discuss a variety of issues to be covered at the conference, including issues in dispute and questions of discovery and scheduling.[173] It also proposed that the parties be required to draft a joint statement summarizing the issues on which they agreed and their remaining disputes, and to submit the statement to the Commission two days before the initial status conference.[174]

A. Timing of Initial Status Conference

68. Several commenters support the proposed timing of the initial status conference.[175] Others contend that fifteen days after the filing of the complaint is too little time to accomplish the various tasks that must be completed before the conference. For example, some commenters argue, before the conference, counsel and certain corporate

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170 *See* RCN Comments at 5-6.

171 *See* Ameritech Comments at 25.

172 *Public Notice* at 5, ¶ 6.

173 *Id.*

174 *Id.*

175 *See, e.g.*, WorldCom Comments at 8; Sprint Comments at 7; MCI Comments at 11.

personnel likely will have to resolve scheduling conflicts in order to accommodate the schedule of the complaint proceeding.[176] Additionally, both sides will have to be able to review and analyze their opponent's automatic document production before they will be able to conduct the meetings necessary to reach agreement on the relevant legal issues and questions of fact.[177]

69. After careful consideration of the comments on this issue, we modify our proposed schedule and direct that the initial status conference in Accelerated Docket proceedings will take place ten calendar days after the answer is due to be filed.[178] This will place the conference twenty days after the service of the complaint, rather than fifteen as proposed in the *Public Notice*. We recognize that this interval of time will require that counsel and parties work with substantial diligence and efficiency. However, we view this short time period as necessary to effectuate the speedy adjudication of disputes that is our main goal for the Accelerated Docket. Here again, we note that the staff's broad discretion in choosing which disputes to accept onto the Accelerated Docket will help guard against many of the difficulties that commenters envision as arising from the brief time before the initial status conference. The staff administering the docket will be able to consider the volume and complexity of the material likely to be subject to automatic production in a dispute.[179] If this material appears to be so voluminous as to make it impossible for either party to comply with the time restrictions of the Accelerated Docket, the staff may simply decline to accept the matter onto the docket. Additionally, we believe that the requirement for supervised pre-filing settlement discussions should further ease counsel's task in preparing for the initial status conference.[180] From these discussions, both parties will have extensive information about the other side's position in the dispute, and this information should simplify the task of preparing for the initial conference.

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176 *See, e.g.*, Cincinnati Bell Comments at 8.

177 *See* Cincinnati Bell Comments at 8, SBC Comments at 16-17, Ameritech Comments at 32-33.

178 *See* Appendix, Rule 1.733(i)(1).

179 *See* Appendix, Rule 1.730(e)(3).

180 *See supra*, ¶¶ 25 - 30.

B. Issues to Be Addressed At Initial Status Conference

70. The *Public Notice* proposed that, before the status conference, the parties meet and confer about a variety of issues, including settlement prospects, discovery, issues in dispute, stipulations, and a schedule for the remainder of the proceeding.[181] It also proposed that, before the status conference, the parties report jointly in writing to the Commission about the results of their discussions on these issues, including disputed and stipulated facts, and key legal issues.[182]

71. Commenters generally favor the proposed substance and structure of the initial status conference.[183] Some commenters suggest, however, that the parties be allowed to file separate statements concerning facts and issues in dispute should they be unable to agree on a joint statement.[184] One commenter also urges that we allow parties to confer by phone for purposes of these meetings.[185] Finally, certain parties are concerned they may not be able adequately to prepare the necessary submissions under the proposed schedule.[186]

72. We believe that early discussion of the specific facts in dispute will assist the parties in focusing on the issues of central relevance to the proceeding; it is therefore critical to the overall success of the Accelerated Docket. However, we are somewhat persuaded by comments that it may be difficult and unnecessarily time-consuming for parties to negotiate a joint statement on all issues discussed before the status conference, particularly the facts and legal questions in dispute. Additionally, because the parties will have extensively explored settlement prospects during the mandatory pre-filing discussions, we question the utility of explicitly requiring further settlement negotiations and a report on them before the status conference. Finally, we think it important for the staff to maintain close control over the progress of Accelerated Docket proceedings. An important means of ensuring such control is

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[181] *Public Notice* at 5, ¶ 6. *See First Report & Order*, 12 FCC Rcd at 22559, ¶ 145 (establishing meet and confer requirement in formal complaints proceedings).

[182] *Public Notice* at 5, ¶ 6. *See First Report & Order*, 12 FCC Rcd at 22602, 03, ¶¶ 258-260 (establishing similar reporting requirements in formal complaints proceedings).

[183] *See, e.g.*, WorldCom Comments at 9; TRA Comments at 15; RCN Comments at 7; USTA Comments at 8; Sprint Comments at 7; MCI Comments at 11.

[184] *See* RCN Comments at 7; TRA at 15.

[185] *See* TRA Comments at 15.

[186] *See* Cincinnati Bell Comments at 8, SBC Comments at 16-17, Ameritech Comments at 32-33.

to require staff approval of all discovery beyond the automatic production of documents with the parties' initial pleadings. Accordingly, we expect each party to come to the status conference prepared to justify any additional discovery that it may wish to conduct. It will speed this process for the parties to have agreed to the discovery each will allow the other to take. However, even when parties have reached agreement on discovery issues, the party seeking discovery should be prepared to justify to the staff the discovery for which it seeks approval. Consistent with our view of the importance of discovery in this process, staff will be inclined to grant such requests that are reasonable and meet the applicable timing constraints.

73. We therefore require that, before the initial status conference, the parties discuss, and attempt to reach agreement on, discovery issues and the factual issues to which they can stipulate; they shall submit to the staff, two business days before the initial conference, a listing of these stipulations and the discovery issues on which they have reached agreement.[187] Parties may conduct these meetings either in person or by telephone conference call.[188] We encourage parties to submit, with their stipulations and discovery agreements, a joint list of facts in dispute and legal issues. However, we realize that, given the brief time available for pre-conference discussions, the parties may be unable to agree to a joint statement covering all of these topics. If the parties are unable to agree on such a joint statement, they may submit separate statements of disputed factual and legal issues.[189] Whether these statements are submitted jointly or separately, they will be due, with the stipulations and agreed discovery, two business days before the initial status conference.

74. Additionally, the complainant's submission before the initial status conference shall respond, as appropriate, to any affirmative defenses that the defendant may have raised in its answer.[190] We believe that, given the constraints of the Accelerated Docket, it will be more efficient to require a complainant to respond to affirmative defenses in this manner than it would be to provide for the filing of a separate reply.

75. At the initial status conference, the responsible staff will review the parties' disputed and stipulated issues of fact. Based on the factual issues that appear from this material, the staff will determine what additional discovery, beyond the initial disclosures, the parties may take. Thus, at the status conference, parties should be prepared to demonstrate

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187 *See* Appendix, Rule 1.733(i)(2), (3).

188 *See* Appendix, Rule 1.733(i)(2).

189 *See* Appendix, Rule 1.733(i)(4).

190 *See* Appendix, Rules 1.726(g)(1), 1.733(i)(4).

specifically how the discovery they seek relates to particular issues in dispute. As we note above,[191] the discovery that the staff may grant at this status conference includes depositions and additional document production. Indeed, in light of the relative efficiency of depositions as a discovery tool, we expect that the staff typically will grant a limited number of depositions appropriate to the issues in, and complexity of, a particular case. Given the truncated nature of the Accelerated Docket, we believe that interrogatories will be of limited usefulness. However, at the initial conference, the staff may grant permission to propound interrogatories if it appears that they will function as an effective alternative to some other form of more time-consuming discovery.[192] As noted elsewhere, where discovery requests are reasonable, we expect that staff will be inclined to grant them.

76. At the initial status conference, the Commission staff also will establish a schedule for the remainder of the proceeding, setting the deadlines for completion of discovery, the pre-hearing submissions discussed below, the minitrial and any post-hearing submissions.

77. Commenters also raise the issue of whether a defendant in an Accelerated Docket proceeding should be required to post a bond or to escrow funds to cover potential damages. Under the *First Report & Order*, the Commission may order a defendant who has lost the liability phase of a bifurcated proceeding to post a bond or escrow funds pending resolution of damages issues.[193] One commenter here recommends that, at the initial status conference on the Accelerated Docket, the responsible staff member should determine whether to require a bond or escrow.[194] Another commenter asserts that the speed of Accelerated Docket proceedings will make bonds or escrows unnecessary.[195] We decline to modify the escrow rules issued with the *First Report & Order*. The staff administering the Accelerated Docket will retain the same discretion as staff does under the *First Report & Order* to require a defendant that has been found liable to post a bond or escrow funds pending a determination of damages.

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191 *See supra* ¶ 59.

192 *See supra* ¶ 62; Appendix, Rule 1.729(i)(3).

193 *First Report & Order*, 12 FCC Rcd at 22585, ¶ 206 (establishing factors Commission shall examine in determining whether funds should be escrowed). *See also* 47 C.F.R. § 1.722(d)(2).

194 CompTel Comments at 7.

195 SBC Comments at 18.

VI. Minitrials

78. The *Public Notice* sought comment on one of the unique characteristics under consideration for the Accelerated Docket, a hearing-type proceeding or "minitrial" to be conducted during each action.[196] The notice stated that such a proceeding likely would offer certain advantages over the all-paper proceeding currently used for formal complaints. It noted that, given the need for dispatch on the Accelerated Docket, the minitrial likely would occur between 40 and 45 days after the filing of a complaint. Furthermore, the *Public Notice* stated that, in order to expedite these minitrials, consideration was being given to allotting to each party a set amount of time in which to present its case.

A. Utility of Minitrial Process

79. Many commenters indicate their support for minitrials at the end of Accelerated Docket proceedings.[197] Their comments state the belief that live proceedings will improve the quality of the administrative record by allowing counsel and the decision maker to elicit more detailed information on factual issues.[198] Additionally, commenters agree that the decision maker's opportunity to observe live testimony likely will allow better credibility determinations than typically are possible in paper proceedings.[199] One commenter asserts that minitrials will allow parties to present their cases more quickly and efficiently than they can through briefs.[200] On the other hand, some commenters oppose minitrials, arguing that it will not be possible to prepare for such a proceeding in the short time available on the Accelerated Docket.[201] GTE asserts that the *Public Notice* fails to provide a sufficient reason for moving away from the paper process that has characterized formal complaints in the past.[202] Another commenter complains of the travel-related expense that the minitrial process

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196 *Public Notice* at 3, ¶ 2.

197 *See, e.g.*, ATU-Long Distance Comments at 1-2; CompTel Comments at 4; MCI Comments at 7; RCN Comments at 3; Teligent Comments at 4; WorldCom Comments at 6.

198 *See, e.g.*, ATU-Long Distance Comments at 1-2.

199 *See, e.g.*, CompTel Comments at 4.

200 *See* ATU-Long Distance Comments at 2 & n.2.

201 *See, e.g.*, GTE Comments at 8.

202 *See id.*

will create for parties who are located a substantial distance from the Commission's offices in Washington, D.C.[203]

80. We strongly believe that minitrials held at the end of Accelerated Docket proceedings will substantially increase the quality and clarity of the record on which complaints are decided. As commenters note, live testimony will permit Commission staff to gauge credibility in a manner that is impossible in paper proceedings. Furthermore, live testimony will allow the parties and the decision maker to flesh out both factual and legal issues in a way that cannot be accomplished within the static limitations of an all-paper process. It goes without saying that direct and cross examination of a witness on a factual question will afford a more complete record than will even a series of affidavits submitted by a party seeking to establish a proposition. This is especially true for the complex, technical issues that often arise in disputes between carriers. Similarly, the give and take of argument possible in a live proceeding necessarily will allow a decision maker to explore the contours of a legal issue more effectively than can occur through briefs themselves. A related benefit of live proceedings is that they will permit the decision maker to focus the parties on those issues that it deems to be central to the dispute; the decision maker will not be required simply to accept the dispute in the posture presented by the parties' briefs.

81. One commenter notes that the availability of a minitrial on the Accelerated Docket may also increase parties' satisfaction with the Commission's decision making process by contributing to the feeling that a party has had its day in court.[204] A related benefit that we envision as likely to result from minitrials is the direct participation of parties' employees in the adjudicative process. We believe that the experience of testifying during a minitrial may give carriers' employees a more immediate appreciation of their individual roles in effectuating compliance with the Act. Thus, having once been called as a witness to explain their actions, employees whose regular duties may have an impact on their employer's compliance with the Act may be more inclined to consider that impact when executing their daily duties. Indeed, we are hopeful that the prospect alone of being called to account for decisions made during the regular course of their employment may cause a variety of carrier employees more frequently to bear in mind how their actions may affect compliance with the Act. We believe that the minitrial process, as well as the prospect, discussed above, of being deposed[205] may give the constraints of the Act a new relevance and immediacy for those whose actions have a direct affect on carriers' compliance with the Act. We believe that this procedure may emphasize the strictures of the Act in a way that cannot be accomplished

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203 *See* Cincinnati Bell Comments at 8.

204 *See* ATU-Long Distance Comments at 1-2.

205 *See supra* ¶ 59.

under a paper process in which carrier employees' involvement with the process typically is restricted to the preparation of an affidavit to be presented by the carrier's counsel.

82. Given the above benefits that we view as likely to arise from minitrials, we believe that, on balance, the advantages of the process outweigh the drawbacks identified by some commenters. We recognize that preparing for a minitrial to be held 40 days after the filing of a complaint may require counsel for both sides to expend some more effort and time than required to prepare and submit a brief under our general complaint rules. However, this increased burden is justified by the more complete record, and the consequently more informed decision, that likely will emerge from the process. Indeed, to the extent that the live presentation of evidence will ensure high quality decisions in complaint proceedings, it appears that all parties to the process will benefit. Moreover, in those cases when the burden of preparing for a minitrial -- or the burden of any other portion of the process -- truly appears to be too great for a party to bear, this may be taken into account when the staff decides whether to admit a proceeding onto the Accelerated Docket. The same is true of the expense posed by the prospect for travel to Washington, D.C., which is identified by another commenter as a drawback of the minitrial process.[206]

B. Structure of Minitrial

83. As noted above, the *Public Notice* inquired about the how the minitrial should be structured. Specifically, it proposed that the minitrial take place between 40 and 45 days after the filing of the complaint and that each side be allotted a specific amount of time in which to present its case.[207] We received a variety of comments on several different aspects of the minitrial process.

84. As noted above, we believe that important benefits will flow from the use of minitrials in Accelerated Docket proceedings. The *Public Notice* indicates that minitrials will go well beyond the scope of the hearings likely to take place under the normal complaint procedures when the Common Carrier Bureau designates an issue for hearing before an ALJ.[208] Within the time limitations discussed below, minitrials will allow parties to Accelerated Docket proceedings to present all aspects of their case to the decision making authority. As also stated in the *Public Notice*, the Accelerated Docket minitrials will not be

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206 *See* Cincinnati Bell Comments at 8.

207 *See Public Notice* at 3, ¶ 2.

208 *Cf. First Report & Order*, 12 FCC Rcd at 22555, ¶ 135.

subject to the on-the-record hearing requirements of the Administrative Procedure Act.[209] Nonetheless, where possible, an Administrative Law Judge ("ALJ") will preside at each minitrial.[210] The ALJ or other presiding staff will run the minitrial, administer oaths to witnesses, and will be in charge of the timing system discussed below. Additionally, where an ALJ participates in the minitrial process, he will render any necessary procedural rulings in consultation with the staff member administering the proceeding who also will be present during the minitrial.[211] Because the staff's prior participation in the proceeding will have given it substantial familiarity with the relevant issues, the Commission staff will serve as the decision maker in Accelerated Docket proceedings, and it, rather than the ALJ who runs the minitrial, will issue the decision in the proceeding. Notwithstanding the staff's responsibility to render decisions in Accelerated Docket proceedings, we believe that the long experience of ALJs in Commission hearing procedures will suit them well to control the courtroom and move along the minitrial in order to ensure the prompt completion of the process.

85. Commenters were generally supportive of the proposal to allocate to each party a specific amount of time in which to present their case at the minitrial.[212] Accordingly, the rules we adopt provide for this type of "chess-clock" timing method.[213] Thus, the ALJ or other Commission personnel who runs the minitrial will deduct from each party's allotment any time that the party's counsel spends examining witnesses, otherwise presenting evidence or presenting argument.[214] Additionally, the ALJ may exercise broad discretion in

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[209] *See Amendment of Rules Governing Procedures To Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report & Order, 58 Fed. Reg. 25,569, 8 FCC Rcd 2614, 2625, ¶ 65 (1993). *See also* 5 U.S.C. § 554. Absent a specific statutory requirement, the APA does not require formal, on-the-record hearings. Section 208 does not impose such a requirement.

[210] *See* Appendix, Rule 1.730(g)(1).

[211] *See id.*

[212] *See* Ameritech Comments at 14-17; MCI Comments at 7; RCN Comments at 3; USTA Comments at 5; WorldCom Comments at 6.

[213] *See* Appendix, Rule 1.730(g)(2).

[214] *See, e.g.*, Reagan W. Simpson & Cynthia A. Leiferman, *Innovative Trial Techniques: Timesaving Litigation Devices or Straight Lines to Disaster*, 26 ABA Fall Brief 21, 22 (1996) (noting that "trial by chess clock" is one innovative technique used to streamline trials); Patrick E. Longan, *The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials*, 35 Ariz. L. Rev. 663, 664-668 (1993) (time limits on trials are not unusual). *Cf. MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1170-72 (7th Cir. 1983) (district court did not abuse discretion by placing (continued...)

determining any time penalty or deduction that he deems appropriate for a party who appears intentionally to be slowing the process or attempting to delay its opponent's presentation.[215] This timing method should ensure that minitrials are conducted quickly, in keeping with the goals of the Accelerated Docket, while maintaining fairness and allowing both parties an adequate opportunity to present evidence and argument.

86. Depending on whether they viewed themselves as most likely to be a complainant or a defendant, some commenters asserted that one side or the other should receive more than half of the total time allotted for the minitrial because of the claimed complexities of presenting their particular side of a dispute.[216] We are unpersuaded by this argument and decline to adopt a rule that assumes either side routinely will need more than half of the time allowed for a minitrial. Rather, under the rules that we adopt today, the Commission staff has broad discretion to allocate the amount of time for a minitrial that it believes to be appropriate based on the complexity of the issues and the amount and type of evidence that appears reasonably necessary for an adequate presentation of each party's case. Under the rules, the staff would be within its discretion to assign either side of a particular dispute more than half of the allowed time, but we expect that such instances will be very rare.

87. Some commenters also suggest that parties be allowed or required to file written, direct testimony before the beginning of the minitrial so that only cross examination and counsel's argument would take place live during the proceeding.[217] We believe that a decision maker's observation of witness demeanor on direct examination is as important and revealing as it is on cross examination. Similarly, we believe that the filing of written direct testimony often would result in parties burdening the record with unnecessary or irrelevant information that simply would slow down the process of reaching a final decision. Accordingly, we decline to adopt this system for introducing evidence in the Accelerated

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214 (...continued)
time limits on antitrust trial); *McKnight v. General Motors Corp.*, 908 F.2d 104, 114-15 (7th Cir. 1990) (endorsing "hour glass" method of limiting the length of trial only if limits are not arbitrarily imposed and are not enforced inflexibly). *But see Flaminio v. Honda Motor Co.*, 733 F.2d 463, 473 (7th Cir. 1984) (expressing disapproval of practice of placing rigid hour limits on a trial, but concluding that method of economizing time did not warrant reversal).

215 *See* Appendix, Rule 1.730(g)(2).

216 *See* ICG Telecom Group Comments at 4; SBC Comments at 8; Cincinnati Bell Telephone comments at 3-4.

217 *See* RCN Comments at 7; Teleport Comments at 6.

Docket. Both sides shall rely on live, rather than written, presentations of their cases at minitrials.[218] We note, however, that the precise format of a party's presentation during a minitrial will be a question on which that party has wide latitude. While we expect that many parties will choose to present witness testimony in support of their cases, nothing in our rules will require such a presentation. Instead, a party might choose to rely on counsel for the presentation of its case. The decision maker necessarily will take the format of a party's case into account in making its findings of fact or credibility determinations. However, apart from refusing the invitation to accept written direct testimony, we decline to impose additional restrictions on the format of parties' presentations during Accelerated Docket minitrials.

88. It will aid in the efficient completion of minitrials for the parties to have notified each other, in advance, of the exhibits they may introduce and the witnesses they may call during the minitrial. This will allow for the disposition of most objections to exhibits before the beginning of the minitrial so that they will not delay the proceeding. We therefore require that, three days in advance of the scheduled beginning of the minitrial, each party shall serve by hand or facsimile, on all other parties to the proceeding, a copy of their exhibits and a list of witnesses that they may call.[219] The ALJ presiding at the minitrial may then hear and rule on any witness or exhibit objections before the beginning of the hearing itself. As discussed below, relevance rarely will be an appropriate basis for objection during minitrials; we also expect that, owing to the administrative nature of the proceeding, other objections will be minimal.[220] We are hopeful that it will speed the minitrials to provide for the advance disposition of objections in this manner.

89. One commenter suggests that we apply certain portions of the Federal Rules of Evidence to the minitrial process. Thus, it is argued, we should adopt the Federal Rules' definition of relevance and impose their restrictions on the admissibility of irrelevant evidence

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218 *See* Appendix, Rule 1.730(g)(2).

219 *See* Appendix, Rule 1.730(g)(3).

220 We note, however, that, as discussed above at paragraph 59, absent a showing of good cause, a party will not be permitted to introduce at a minitrial evidence from a witness in that party's employ unless the witness and an adequate description of the issues on which she will testify appeared in the information designation accompanying the party's initial pleading. *See* 47 C.F.R. §§ 1.721(a)(10)(i), 1.724(f)(1) (requirements for information designations); *see also* Appendix, Rule 1.730(g)(4).

and on the scope of cross examination.[221] We believe that the minitrial process will function most effectively if, to the greatest extent possible, its conduct is left to the discretion of the ALJ and the staff administering the Accelerated Docket. We therefore decline to adopt the suggested evidentiary rules. Rather, we believe that the strict time limitations under which parties will operate in minitrials should serve to deter and sanction the introduction of extensive amounts of irrelevant material: the introduction of irrelevant evidence merely will reduce the time available for other, more pertinent portions of the proponent's case.[222]

90. As we have noted above, we are hopeful that the minitrial process will serve as a more effective and informative alternative to the briefs that typically are filed in complaint proceedings. However, we also believe that it will aid the parties in focusing their presentations, and the responsible staff in promptly rendering a decision, if the parties submit some documentation outlining their arguments. Thus, we require that parties submit proposed findings of fact and conclusions of law two days before the beginning of the minitrial.[223] In length, these shall not exceed 40 pages per party. Additionally, no more than three days after the conclusion of the minitrial, parties may, but are not required to, submit revised proposed findings of fact and conclusions of law to respond to evidence and legal argument raised during the minitrial.[224] This second set of submissions should permit the parties a final opportunity to explain complex technical issues involved in the proceeding and to rebut their opponents' arguments.[225] This second set of submissions shall not exceed 20 pages per party.

VII. Damages

91. The *Public Notice* sought comment on limiting the Accelerated Docket to bifurcated liability claims, with damages claims being handled separately under the procedures in the *First Report & Order*.[226] The overwhelming majority of commenters

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221 *See* Ameritech Comments at 17 (advocating application of Federal Rules of Evidence 401-03 and 611(b)).

222 *Cf.* Ameritech Comments at 17

223 *See* Appendix, Rule 1.730(g)(5).

224 *Id.*

225 *Cf.* GTE Comments at 8.

226 *See Public Notice* at 6, no.7.